

KIRKLAND & ELLIS LLP

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October 13, 2023

Via ECF

The Honorable Martin Glenn
Chief United States Bankruptcy Judge
United States Bankruptcy Court
Southern District of New York
Alexander Hamilton U.S. Custom House
One Bowling Green, Courtroom 523
New York, NY 10004-1408

Re: *In re Celsius Network LLC*, No. 22-10964 (MG) – Discovery Motion
Regarding Confirmation Testimony & Evidence of *Pro Se* Creditor Richard
Phillips

Dear Chief Judge Glenn:

The Debtors write pursuant to Local Rule 7001-1 to request a discovery conference at the Court's convenience regarding the requested deposition of *pro se* creditor Richard Phillips. After multiple days of scheduling discussions with the Debtors, Mr. Phillips indicated yesterday that he will be unable to sit for a deposition over the next three days, offering, at most, a meet and confer at noon eastern on Monday—just two hours before the confirmation scheduled hearing is set to resume at 2:00 pm, prevailing Eastern Time. The Debtors therefore request that: (i) Mr. Phillips be compelled to sit for a virtual deposition no later than Sunday, October 15, 2023, in advance of the evidentiary hearing; (ii) Mr. Phillips be precluded from offering testimony or evidence during the evidentiary hearing until he does sit for a deposition; and/or (iii) testimony and evidence elicited by Mr. Phillips to date be stricken from the record in the event he does not sit for a deposition.

Factual Background. Despite voting in favor of the proposed chapter 11 plan, Mr. Phillips filed an objection to the plan on September 22, 2023, Dkt. No. 3557, and proceeded to question multiple witnesses testifying in support of confirmation during the confirmation hearing. In advance of the objection phase of the confirmation hearing, the Debtors, on October 6, 2023, asked Mr. Phillips whether he intended to submit written testimony and asked for his availability for a deposition between October 9-13, 2023. *See* Ex. A. During the parties' meet and confer, at no point did Mr. Phillips suggest—as he does now—that the Debtors request did not “provide[]

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sufficient notice under Federal Rules for any deposition” or that he was unavailable. Ex. B. Instead, he previewed his desire to reopen discovery to take depositions of his own (of Committee witnesses)—a request the Court has since denied. *See* Dkt. No. 3765. In short, Mr. Phillips was willing to engage in at least *some* discovery in advance of the objection portion of the confirmation hearing as recently as October 10, 2023. *See* Dkt. No. 3746.

Now that his own discovery request has been denied, however, Mr. Phillips refuses to sit for a deposition before October 16, 2023, when the confirmation hearing resumes. To be clear, Mr. Phillips does not contend that he falls beyond the scope of the Court’s order authorizing depositions of declarants who submitted written testimony in opposition to confirmation. Instead, he advances burden and notice of objections, none of which have merit. Mr. Phillips’ position is further set forth in the parties’ deposition-related correspondence, *see* Ex. B and Dkt. Nos. 3746, 3758, 3765, and a summary of the parties’ correspondence appears below:

- October 6, 2023: The Debtors ask whether Mr. Phillips intends to submit written testimony in opposition to confirmation and asks for his availability to sit for a deposition between October 9-13, 2023. *See* Ex. A. The Debtors and Mr. Phillips have a telephonic meet and confer.
- October 10, 2023: In seeking a discovery extension from the Court, Mr. Phillips states that he “support[s] the Extension of the Deposition Period, *provided that* it allows objectors to depose fact witnesses.” Dkt. No. 3746 (emphasis added).
- October 11, 2023 (2:13 pm ET): The Court denies Mr. Phillips request to reopen discovery. Dkt. No. 3765.
- October 11, 2023 (5:15 pm ET): The Debtors ask Mr. Phillips to provide his availability for deposition on October 14, 2023, following up on an earlier phone call between Debtors’ counsel and Mr. Phillips. *See* Ex. B.
- October 12, 2023 (10:57 am ET): Having received no response from Mr. Phillips, the Debtors renew their request for Mr. Phillips’ deposition availability and offer additional dates and times, including Friday October 13, 2023. Ex. B.
- October 12, 2023 (2:57 pm ET): The Debtors again renew their request for Mr. Phillips’ deposition availability and inform Mr. Phillips that they will ask the Court to exclude his testimony if he refuses to sit for a deposition. Ex. C.
- October 12, 2023 (4:58 pm ET): Mr. Phillips responds to Debtors’ 10:57 am ET email—ignoring the Debtors’ 2:57 pm email—and calls a weekend deposition “overly

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burdensome,” while informing counsel for the first time that he has a “full schedule” on Friday. Ex. B. Mr. Phillips offers to meet and confer at noon ET on Monday, two hours before the confirmation hearing is set to begin.

- October 12, 2023 (6:35 pm ET): The Debtors inform Mr. Phillips that the Court has ordered another *pro se* creditor, Otis Davis, to sit for deposition before the hearing and again request Mr. Phillips’ deposition availability on October 14 or 15.
- October 12, 2023 (9:38 pm ET): Mr. Phillips calls the “facts and circumstances” of his situation and Mr. Davis’s “wildly different” and states that his “offer” of a meet and confer on Monday, October 16 stands.

Argument. It is well established that a party that refuses to sit for a deposition may be precluded from offering trial testimony in support of his or her claim. *See, e.g., Lewis v. City of New York*, 2013 WL 6283507, at *1 (S.D.N.Y. Dec. 4, 2013) (“To allow Downing to testify at trial despite having failed to appear for a deposition on six different occasions, despite having disregarded a court-ordered subpoena, and despite discovery having closed, would not only prejudice Defendants’ ability to defend this case, but would also encourage other potential witnesses to skirt their discovery obligations even after being ordered to comply by the Court.”); *Butler v. Bosclair*, 2012 WL 13024764, at *2 (N.D.N.Y. July 19, 2012) (“Under all of the circumstances, the Court grants defendant’s motion to preclude the testimony of Dr. Isele based on his failure to appear for deposition.”); *Harewood v. Braithwaite*, 2013 WL 5366391, at *4 (E.D.N.Y. 2013) (“The Court grants Defendant’s motion with respect to Paul Gibbs based on his refusal to be deposed even when subpoenaed.”). The Debtors therefore request one or more of the following forms of relief: (i) that Mr. Phillips be compelled to sit for deposition in advance of October 16, 2023; (ii) that Mr. Phillips be precluded from offering testimony or evidence during the objection phase of the confirmation hearing unless and until he sits for a deposition; and (iii) that any testimony or evidence elicited by Mr. Phillips to date be stricken from the record.

Mr. Phillips has offered no legitimate reason to delay his deposition. **First**, the fact that Mr. Phillips finds a weekend deposition “overly burdensome” does not justify a four-day delay before he is even willing to meet-and confer, let alone sit for a deposition, particularly given the expedited confirmation schedule. Mr. Phillips’ purported burden—as well as his late-breaking all-day scheduling conflict on Friday, October 13—is difficult to square with his request to depose multiple fact witnesses during this same expedited time frame. *See* Dkt. No. 3746. If Mr. Phillips had time to depose multiple Committee witnesses, he has time to sit for a deposition to allow the Debtors to explore the bases and foundation for Mr. Phillips’ objection to the plan.

Second, Mr. Phillips’ process-related points are similarly unfounded. Mr. Phillips suggests that his circumstances are “wildly different” from Mr. Davis’s, and he claims that any deposition

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notice is late under the federal rules. Ex. B. Not so. On October 10, 2023, the Court issued an order making clear that “[t]he period for the Debtors to depose individuals who indicate an intent to submit written testimony in opposition to confirmation is extended to between October 10, 2023 and the day before that witness is proposed to testify.” *See* Dkt. No. 3740 at 1. Mr. Phillips has submitted written testimony opposing confirmation, *see* Dkt. No. 3758, meaning he falls within the scope of the confirmation procedures order. He also waited 6 days to raise any procedural objection to the deposition request, while engaging in meet-and-confers and other discussions with counsel along the way. The Debtors’ request for Mr. Phillips’ deposition falls squarely within the four-corners of the Court’s amended confirmation procedures order, *see* Dkt. No. 3740, and should be allowed to proceed.

* * *

Mr. Phillips cannot affirmatively offer the evidence of his choosing without subjecting himself to the same procedures this Court has set for all other objecting creditors, *pro se* or otherwise. The Debtors thus request that the Court order one or more of the following forms of relief: (i) Mr. Phillips be compelled to sit for a virtual deposition no later than Sunday, October 15, 2023, in advance of the evidentiary hearing; (ii) Mr. Phillips be precluded from offering testimony or evidence during the evidentiary hearing until he does sit for a deposition; and/or (iii) testimony and evidence elicited by Mr. Phillips to date be stricken from the record in the event he does not sit for a deposition. The Debtors are available for a discovery hearing at the Court’s convenience.

Sincerely,

/s/ Grace C. Brier

Grace C. Brier

Exhibit A

From: McCarrick, T.J.
Sent: Friday, October 6, 2023 9:38 AM
To: Rick Phillips; Sturek, Ken
Subject: RE: Confirmation Witnesses and Exhibits

Dear Rick-

Do you intend to submit written testimony in advance of the second phase of the confirmation hearing? If so, the Debtors intend to take your deposition and would ask for your availability between October 9-13.

Regards,
T.J.

From: Rick Phillips <rrphillips1@gmail.com>
Sent: Thursday, October 5, 2023 9:56 AM
To: Sturek, Ken <ksturek@kirkland.com>
Cc: McCarrick, T.J. <tj.mccarrick@kirkland.com>
Subject: Re: Confirmation Witnesses and Exhibits

This message is from an EXTERNAL SENDER

Be cautious, particularly with links and attachments.

Ken,
Thank you very much.
Rick

On Thu, Oct 5, 2023 at 6:34 AM Sturek, Ken <ksturek@kirkland.com> wrote:

Mr. Phillips – Attached are the transcripts we have received so far for the Confirmation proceedings. I will send along the transcript for 10/4 when it is received.

Ken Sturek

Senior Paralegal

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[1301 Pennsylvania Ave., N.W.](#)

[Washington, D.C. 20004](#)

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ksturek@kirkland.com

From: McCarrick, T.J. <tj.mccarrick@kirkland.com>
Sent: Thursday, October 5, 2023 9:16 AM
To: Rick Phillips <rrphillips1@gmail.com>
Cc: #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; Koenig, Chris <chris.koenig@kirkland.com>; Kwasteniet, Ross M. <rkwasteniet@kirkland.com>; Latona, Dan <dan.latona@kirkland.com>; Simson, Hannah C. <hannah.simson@kirkland.com>; Sturek, Ken <ksturek@kirkland.com>
Subject: RE: Confirmation Witnesses and Exhibits

Rick-

As soon as I have the transcripts, I'll send them.

-T.J.

From: Rick Phillips <rrphillips1@gmail.com>
Sent: Wednesday, October 4, 2023 11:23 PM
To: McCarrick, T.J. <tj.mccarrick@kirkland.com>
Cc: #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; Koenig, Chris <chris.koenig@kirkland.com>; Kwasteniet, Ross M. <rkwasteniet@kirkland.com>; Latona, Dan <dan.latona@kirkland.com>; Simson, Hannah C. <hannah.simson@kirkland.com>; Sturek, Ken <ksturek@kirkland.com>
Subject: Re: Confirmation Witnesses and Exhibits

Any update on the daily transcripts from this week or expected timing?

Thanks,

Rick

On Wed, Oct 4, 2023 at 8:21 AM Rick Phillips <rrphillips1@gmail.com> wrote:

Thank you T.J.

On Wed, Oct 4, 2023 at 8:17 AM McCarrick, T.J. <tj.mccarrick@kirkland.com> wrote:

I believe we are, Rick. We'll provide a copy of any transcript once we receive it. The court reporting service is Veritext Legal Solutions.

Regards,

T.J.

From: Rick Phillips <rrphillips1@gmail.com>
Sent: Wednesday, October 4, 2023 10:57 AM
To: McCarrick, T.J. <tj.mccarrick@kirkland.com>
Cc: Sturek, Ken <ksturek@kirkland.com>; Kwasteniet, Ross M. <rkwasteniet@kirkland.com>; Latona, Dan <dan.latona@kirkland.com>; Simson, Hannah C. <hannah.simson@kirkland.com>; #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; Koenig, Chris <chris.koenig@kirkland.com>
Subject: Re: Confirmation Witnesses and Exhibits

Kirkland team,

Are you ordering a transcript for yesterday's, 10/3/23, hearing? If so, can you provide me with the name of the service and a copy of it.

Thanks,

Rick

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for the use of the addressee. It is the property of Kirkland & Ellis LLP or Kirkland & Ellis International LLP. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return email or by email to postmaster@kirkland.com, and destroy this communication and all copies thereof, including all attachments.

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Exhibit B

From: Rick Phillips <rrphillips1@gmail.com>
Sent: Thursday, October 12, 2023 9:38 PM
To: Brier, Grace C.
Cc: #CEL_Litig; #CelsiusRx; Colodny, Aaron; Hershey, Samuel; McCarrick, T.J.; Weedman, Joshua
Subject: Re: Celsius // Deposition Scheduling

This message is from an EXTERNAL SENDER

Be cautious, particularly with links and attachments.

Grace,

Respectfully, that's your opinion.

I'm aware of the court order regarding Mr. Davis. The facts and circumstances are wildly different. You have not provided sufficient notice under Federal Rules for any deposition. My offer of a Monday meet and confer stands.
Rick

On Thu, Oct 12, 2023 at 3:35 PM Brier, Grace C. <grace.brier@kirkland.com> wrote:

Rick,

There is no undue burden in sitting for a deposition over the weekend. In fact, the Court just ordered another pro se creditor to sit for a deposition by noon on Saturday. Our letter to the Court and the Court's order is attached. If you decline to sit for a deposition, we will similarly ask the Court to exclude your testimony and all evidence and testimony elicited by you previously.

Please confirm when you can sit for a deposition on Saturday or Sunday. A Monday meet and confer is not acceptable.

Best,

Grace

Grace C. Brier

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grace.brier@kirkland.com

From: Rick Phillips <rrphillips1@gmail.com>
Sent: Thursday, October 12, 2023 4:58 PM
To: Brier, Grace C. <grace.brier@kirkland.com>
Cc: #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; Colodny, Aaron <aaron.colodny@whitecase.com>; Hershey, Samuel <sam.hershey@whitecase.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Weedman, Joshua <jweedman@whitecase.com>
Subject: Re: Celsius // Deposition Scheduling

Grace,

A weekend deposition is overly burdensome. On Friday I have a full schedule already and am unavailable. I'm willing to meet and confer via phone regarding the matter Monday before the 2pm ET hearing, say at Noon ET / 9am PT.

Thanks,

Rick

On Thu, Oct 12, 2023 at 7:57 AM Brier, Grace C. <grace.brier@kirkland.com> wrote:

Rick,

Please also let us know your availability tomorrow afternoon (Friday) starting at 12 pm ET, reserving additional time on Saturday afternoon starting at 1 pm ET. If possible, we would propose splitting the deposition time over two days in an attempt to avoid a deposition over a large window of your time over the weekend.

We'd ask that you confirm your availability by 2 pm ET today so we can lock in the appropriate logistics in advance of the deposition.

Thank you,

Grace

Grace C. Brier

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grace.brier@kirkland.com

From: Brier, Grace C.
Sent: Wednesday, October 11, 2023 5:15 PM
To: 'rrphillips1@gmail.com' <rrphillips1@gmail.com>
Cc: #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Weedman, Joshua <jweedman@whitecase.com>; 'Colodny, Aaron' <aaron.colodny@whitecase.com>; Hershey, Samuel <sam.hershey@whitecase.com>
Subject: Celsius // Deposition Scheduling

Rick,

As discussed, we intend to take your deposition this weekend via Zoom. Can you please confirm your availability Saturday? Assuming you are on Pacific Time, we can begin at 1 pm ET to accommodate the time difference. A formal deposition notice will follow once we have a confirmed start time.

Best,

Grace

Grace C. Brier

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Exhibit C

From: Brier, Grace C.
Sent: Thursday, October 12, 2023 2:56 PM
To: rrphillips1@gmail.com
Cc: #CEL_Litig; #CelsiusRx; McCarrick, T.J.; Weedman, Joshua; Colodny, Aaron; Hershey, Samuel
Subject: RE: Celsius // Deposition Scheduling

Rick,

We have not heard from you regarding your availability for deposition. Please provide your availability for a deposition no later than 6 pm ET today. In the event you do not do so, or refuse to sit for a deposition, the Debtors will move to strike any affirmative testimony and evidence that you intend to offer.

Best,
Grace

Grace C. Brier

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grace.brier@kirkland.com

From: Brier, Grace C. <grace.brier@kirkland.com>
Sent: Thursday, October 12, 2023 10:57 AM
To: rrphillips1@gmail.com
Cc: #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Weedman, Joshua <jweedman@whitecase.com>; Colodny, Aaron <aaron.colodny@whitecase.com>; Hershey, Samuel <sam.hershey@whitecase.com>
Subject: RE: Celsius // Deposition Scheduling

Rick,

Please also let us know your availability tomorrow afternoon (Friday) starting at 12 pm ET, reserving additional time on Saturday afternoon starting at 1 pm ET. If possible, we would propose splitting the deposition time over two days in an attempt to avoid a deposition over a large window of your time over the weekend.

We'd ask that you confirm your availability by 2 pm ET today so we can lock in the appropriate logistics in advance of the deposition.

Thank you,
Grace

Grace C. Brier

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grace.brier@kirkland.com

From: Brier, Grace C.

Sent: Wednesday, October 11, 2023 5:15 PM

To: 'rrphillips1@gmail.com' <rrphillips1@gmail.com>

Cc: #CEL_Litig <CEL_Litig@kirkland.com>; #CelsiusRx <CelsiusRx@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Weedman, Joshua <jweedman@whitecase.com>; 'Colodny, Aaron' <aaron.colodny@whitecase.com>; Hershey, Samuel <sam.hershey@whitecase.com>

Subject: Celsius // Deposition Scheduling

Rick,

As discussed, we intend to take your deposition this weekend via Zoom. Can you please confirm your availability Saturday? Assuming you are on Pacific Time, we can begin at 1 pm ET to accommodate the time difference. A formal deposition notice will follow once we have a confirmed start time.

Best,
Grace

Grace C. Brier

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